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No. 05-381

IN THE
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err when it held:

> [W]e hold that the high standard of liability in *Brooke Group* [*Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)] does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing.

Pet. App. 11a.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Ross-Simmons Hardwood Lumber Company, Inc. states that it has not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

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INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. The Ninth Circuit's decision does not conflict with the decision of any other court of appeals. Nor does it conflict with any decision of this Court. Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court.

The question presented – whether the holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ("*Brooke Group*") should be extended to the quite different scenario of Weyerhaeuser's abuse of monopsony power – is so idiosyncratic that no federal court apart from the Ninth Circuit in this case has had occasion to consider it (or even any closely related issue) in the 12 years since *Brooke Group* was decided. The present case thus stands in stark contrast to the 20-year build-up prior to *Brooke Group* of conflicting court of appeals case law on a common issue of exceptional importance (aggressive price-cutting by sellers). *See Brooke Group*, 509 U.S. at 223-27 (detailing that history).

Although petitioner Weyerhaeuser Company asserts that "the Ninth Circuit's analysis departs from the principles announced by this Court" in *Brooke Group*, Pet. at 13, Weyerhaeuser's position actually is that the special rule of liability of *Brooke Group* should be *extended* to cover the fundamentally different market economics and intentional anticompetitive conduct in this monopsony case, which included a combination of pricing and non-pricing behavior. In contrast to the basic price-cutting sale transactions considered in *Brooke Group*, here a dominant buyer with market power forced competitors out of business by intentionally *driving up the costs of and denying competitors*

access to a limited supply of natural resource inputs essential for production, with the specific intent of driving input prices down after rivals were forced to exit.

The Ninth Circuit concluded that this conduct can cause consumer harm and does not necessarily or invariably benefit consumers or producers, unlike the aggressive price-cutting that directly benefited consumers in *Brooke Group*. Pet. App. 9a-11a. Furthermore, the Ninth Circuit concluded that Weyerhaeuser's anticompetitive strategy not only was feasible but was likely to succeed, given the unique characteristics of the inelastic market for the limited supply of alder sawlogs. *Id.* 10a-11a. Thus, neither the holding nor the underlying reasoning of *Brooke Group* applies to the quite different factual and economic circumstances present here, and the Ninth Circuit's decision cannot be said to be inconsistent (much less to conflict), even "in principle," with *Brooke Group*.[1]

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[1] In June 2004, this Court denied review in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 141 (2004), wherein the petitioner 3M Company and an array of *amici* from various businesses and trade associations argued unsuccessfully that the *Brooke Group* requirements for predatory price-cutting must be applied outside their context to a claim alleging liability based on bundled rebates by a monopolist seller. Before denying review, the Court asked for the position of the United States, which counseled against review for a range of reasons that apply *a fortiori* here, including lack of a conflict and inadequate development of the law in the lower courts, no pressing need or compelling reason for a decision, and insufficient experience, data, and professional literature to gauge the risk of false positives. Brief for the United States as *Amicus Curiae* at 8, *3M Company v. LePage's Inc.*, 124 S. Ct. 2932 (2004) (No. 02-1865) (hereafter "U.S. Br.") (summarizing reasons to deny review).

Lacking any case law conflict or other viable argument for review, petitioner misstates the impact of one isolated jury instruction on anticompetitive conduct to support an implausible claim that the Ninth Circuit articulated a radical and expansive new rule of law that threatens "economic dislocation on a national scale." Pet. at 2. In reality, the Ninth Circuit broke no new ground and, in fact, simply followed a precedent, *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), that has been on the books for 22 years without triggering any economic consequences, much less the chaos the petition forecasts. Pet. App. 12a-13a.

Far from issuing an expansive or novel decision, a unanimous panel, with substantial practical, jurisprudential, and academic antitrust experience,[2] applied well-established Sherman Act Section 2 principles of liability. 15 U.S.C. § 2. Those principles derive from this Court's decisions, and they also are embodied in model jury instructions on anticompetitive conduct that were integrated into the district court's instructions here. *Id.* 13a-15a, 17a. Judge Nelson's opinion for the panel carefully crafted a holding expressly narrow in scope:

> [W]e hold that the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a

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[2] The Ninth Circuit's opinion was authored by Judge Thomas G. Nelson, a Senior Circuit Judge. The panel's opinion was joined by Judge William W. Schwarzer, a Senior United States District Judge sitting by designation, formerly the Director of the Federal Judicial Center and author of the book, *Managing Antitrust and Other Complex Litigation* (1982). The panel was presided over by Judge Jonnie B. Rawlinson, an active Circuit Judge sitting on the Ninth Circuit.

> relatively inelastic market, not predatory pricing.

Id. 11a.

Thus, the petition should be denied.

COUNTERSTATEMENT

The petition for certiorari conveys the impression that the Ninth Circuit upheld Section 2 liability in this case based upon nothing more than a jury verdict that Weyerhaeuser paid more than it should have for alder sawlog inputs for its sawmill business. That is a false impression. The petition omits key details about the nature of the market and the nature and effect of Weyerhaeuser's conduct. The petition also misstates the issue raised below and preserved for review, as well as the terms and scope of the Ninth Circuit's decision.

A. Factual Background

The Pacific Northwest is home to dense forests that contain sufficient hardwoods to support the only concentration of hardwood sawmills in the western United States. One of these hardwoods – red alder – grows among the predominantly softwood forests west of the Cascade mountains. Because alder represents 95% of the Pacific Northwest's annual hardwood lumber production, the hardwood mills in the area are called the "alder industry." *Id.* 2a.

Alder sawlogs in the Pacific Northwest comprise a seasonal, regional natural resource input market that has little in common with the broad range of markets that exist on the "buy-side" of the antitrust spectrum. For starters, as the

Ninth Circuit noted, the market is "relatively inelastic." *Id.* 11a. That is, the supply of alder sawlogs generally does not react to the demand for or the cost of alder sawlogs. Rather, several independent factors govern supply. The amount of alder harvested in any given year is limited by the fact that alder is a "come-along" species, which means that its harvest is a byproduct of the much larger and more valuable softwood harvests. It would not be profitable, or even feasible, to harvest alder separate from the harvest of softwood timber. Further, alder trees take 30 years to mature for harvest, so the amount of the near-term supply is a function of planting decisions made decades ago and is not a function of the price that the sawlogs may fetch in any given season. *Id.*; ER 438; SER 117-18, 347, 410-11.[3]

Of equal importance to the inelasticity of the market is the fact that this is a market for a natural resource that is necessary for production. Alder trees are a finite natural resource. Unlike the ordinary sale transaction examined in *Brooke Group*, here Weyerhaeuser as a "dominant" buyer not only had "an ability to control alder sawlog prices," Pet. App. 17a, but also "Weyerhaeuser's overbidding for sawlogs clearly threatened competition because it restricted competitors' access to the limited supply of sawlogs," *id.* 19a.

Ross-Simmons Hardwood Lumber Company, Inc. ("Ross-Simmons") was a pioneer in the alder lumber business, beginning in 1962 and operating its Longview, Washington sawmill continuously until it went out of

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[3] Ross-Simmons' Brief of Appellee sets out a complete statement of relevant facts with record citations at pp. 6-23, 28-37, and 51-58. Select citations to the record in this Opposition refer to "ER" for the Excerpt of Record and "SER" for the Supplemental Excerpts of Record.

business in 2001. Prior to Weyerhaeuser's anticompetitive conduct, Ross-Simmons experienced steady growth in lumber output and consistent profits for more than 30 years, as it solidified into the number two player in the industry. *Id.* 3a; ER 72-73, 87-90, 275-78; Brief of Appellee at App. 02.

Weyerhaeuser, already the nation's largest wood products company, entered the alder industry with the acquisition of two Washington sawmills in 1980. Weyerhaeuser added a third mill, also in Washington, in the mid-1980's. In 1995, Weyerhaeuser acquired three more mills and two of its major competitors including Oregon's largest producer, and thereby controlled six operations in western Oregon and Washington. In 2000, Weyerhaeuser secured the "dominant alder supply" position in British Columbia when it acquired the only sizeable alder sawmill in the Province and its long-term contracts for public log supply. Pet. App. 3a; ER 93-94; SER 68, 140-41, 258-65 (corrected at ER 624), 492.

Within six years of its 1980 entry, Weyerhaeuser's share of the Pacific Northwest alder sawlog market was 50%. By 1996, this share was 65% and by 2001, it had reached 75%. Meanwhile, 31 alder operations went out of business, leaving only 15 mills still operating in Oregon and Washington. Weyerhaeuser owned six of them, plus the only sizeable producer in British Columbia. The remaining mills were owned by nine different individual owners. Pet. App. 3a, 17a, 21a, 23a; ER 93, 443-48; SER 68-69, 127-28, 152-53, 157, 234, 261-62, 492.

Once it had achieved a dominant position, Weyerhaeuser engaged in a calculated, multifaceted plan to "consolidate" and control the alder sawlog input market. Weyerhaeuser targeted its leading competitor Ross-Simmons

for elimination; "tracked competitors' profit margins and estimated the potential effects of targeted increases in sawlog costs on the ability of low-margin competitors to survive," Pet. App. 20a; acquired other competitors and expanded their capacity; and purchased extensive forest lands or locked-in exclusive agreements for alder sawlogs that otherwise would have been potentially available to Ross-Simmons. *Id.* 18a-20a, 24a; SER 74-76, 128, 143-45, 193-98, 242, 251-52, 387-91, 418-19, 439-62, 492-500, 549-77.

The record showed that Weyerhaeuser "was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard, and that [Weyerhaeuser] allegedly overpaid by $20 million per year for logs as part of a scheme to deliberately deprive Ross-Simmons of logs or forcing it to operate at a loss by driving up its costs." Pet. App. 34a (Opinion and Order on Renewed Motion for JMOL).

The record also demonstrated that Weyerhaeuser set up a competing mill across the street from Ross-Simmons and covertly subsidized that unprofitable mill to ensure that it would survive by "internally transferring lumber [sic: logs] to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs." *Id.* 33a (JMOL Opinion). As the district court acknowledged, this evidence supports an "inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations . . . and that Defendant's course of conduct . . . was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition." *Id.*

Sawlogs are the lifeblood of the mills, and their cost constitutes as much as 75% of the entire cost of operations. Historically, until Weyerhaeuser acquired market power and began to raise the cost of sawlogs artificially, the cost of sawlogs always had followed temporally and tracked ... metarily the price of lumber. Weyerhaeuser's decision to raise the cost of sawlogs, while the price of milled lumber fell, made it impossible for Ross-Simmons and other competitors to make a profit and remain in business, at a steep cost to Weyerhaeuser which "had given up some $40 to $60 million dollars in the last three years" by its own senior analyst's calculations. *Id.* 19a. Weyerhaeuser's internal strategic planning documents reveal that the Company knew that alder log supplies were inelastic and that a two-pronged strategy could eliminate competitors and increase defendant's market share to 85% by 2003-2007. *Id.* 3a, 17a, 19a-21a; ER 437-38, 450-52, 461-62; SER 70-71, 81, 105-106, 172-75 (corrected at ER 622), 209-21, 374-76, 384-87.

Indeed, the record was replete with direct evidence that Weyerhaeuser acted with the conscious, specific intent to destroy its competitors and control access to alder logs, so that it could maintain monopsony control and drive the prices of that input down over the long term. In 2001, Weyerhaeuser's Director of Finance and Planning stated during internal meetings, "[t]hat was the business strategy, to price up logs to deal with competition," and Weyerhaeuser's division head stated that "we had given up about $20 million in potential log cost opportunity within the past year." Weyerhaeuser's own managers testified, "[i]t was taken as a given [by senior Weyerhaeuser management] that we could influence price;" Weyerhaeuser had a "well-known monopolistic basis" in the alder sawlog market; and "we raised the price of logs when we had adequate supplies." *Id.* 17a-19a; SER 156-60, 203-205, 217-24.

Although some within Weyerhaeuser opposed this strategy, the view that Weyerhaeuser's own increased costs would be recouped many times over by driving down prices once competitors were eliminated always carried the day. At a strategic planning session in 2001, Weyerhaeuser projected the ability to drive sawlog costs down in 2002 and 2003 as a number of competitors closed their mills. When impeached with one of these planning documents, Weyerhaeuser's top executive in charge of raw materials admitted that projected near-term reductions in log costs would dramatically bolster the alder division's profitability. Pet. App. 19a-21a; SER 157-5[illegible], 406-409, 450-58.

Weyerhaeuser's strategy worked as planned. From 1996 on, Weyerhaeuser controlled an increasing share of the region's log supply through exclusive log supply arrangements, forcing its competitors to compete for an increasingly smaller fraction of the annual harvest. Many competing hardwood mills were forced out of business. Ross-Simmons saw its 30-year track record of profitability dramatically reversed, and was forced to close its doors and lay off its 170 employees in 2001. Pet. App. 18a-21a, 24a; ER 91; SER 67, 154-59.

B. Proceedings Below

This Section 2 action was filed against Weyerhaeuser in December 2000 in the United States District Court for the District of Oregon. Ross-Simmons alleged that Weyerhaeuser deployed an array of exclusionary tactics designed to foreclose much of the log supply from competitors, with price manipulation in the remaining "open market" to drive up log prices to levels that forced its competition to lose money and ultimately to go out of business. Ross-Simmons alleged 15 different specifications

of anticompetitive conduct, only two of which pertained to price-related conduct. The other allegations fell into four general categories: (1) aggressively acquiring competitors; (2) entering restrictive or exclusive contracts with sawlog suppliers; (3) overbuying; and (4) making misrepresentations to state officials to obtain sawlogs from state forests.[4] Pet. App. 3a-4a; 24a; ER 44-63.

At trial, Weyerhaeuser defended its actions as legitimate competitive business practices. Weyerhaeuser's legal position was that *Brooke Group* must apply. Weyerhaeuser accordingly contended that it was entitled to JMOL because Ross-Simmons could not prove unprofitability and a dangerous probability of recoupment or, in the alternative, Weyerhaeuser contended that it was entitled to a new trial because the jury instructions lacked a statement of those *Brooke Group* requirements. Pet. App. 7a-8a.

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[4] Substantial evidence supports each of Ross-Simmons' alternative allegations of anticompetitive conduct, and any single supported allegation is sufficient to require affirmance. *See* Pet. App. 18a n.42 (so holding with respect to the allegation of exclusionary bidding addressed by the Ninth Circuit). Although the Ninth Circuit did not need to consider the alternative bases for affirmance, they exist nonetheless. Ross-Simmons hereby states its reliance on those alternative bases for affirmance and incorporates by this reference its Brief of Appellee in the Ninth Circuit, which expressly addressed those issues. *See* Sup. Ct. R. 15.2 (regarding raising issues that "properly would be before the Court if certiorari were granted"); Brief of Appellee at 2, 4-5, 27, 50-59.

The case was submitted to the jury on a theory of monopsony liability. The jury was instructed that it could impose Section 2 liability only if it found that Weyerhaeuser had market power in the input market for alder logs in the Pacific Northwest, and only if Weyerhaeuser had engaged in anticompetitive conduct within that market that caused antitrust injury. Contrary to the suggestion in the petition for certiorari, the jury was not instructed that it could find Weyerhaeuser's conduct to be anticompetitive under Section 2 if it merely concluded that Weyerhaeuser paid too much for alder logs. Rather, the jury was instructed that:

> Anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market, making it very difficult or impossible for competitors to engage in fair competition. Not everything that enables a company to gain or maintain a monopoly is anti-competitive.
>
> In deciding whether conduct is anti-competitive, you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition. Anti-competitive conduct does not include ordinary means of competition, such as offering better products or services, exercising superior skill or business judgment, utilizing more efficient technology, better marketing, or exercising natural

> competitive advantages such as unique geographic access to raw materials or markets.

Id. 14a n.30.

The instructions then went on to examine several categories of plaintiff's exclusionary conduct allegations in a careful effort by the district judge to apply the model definition of anticompetitive conduct to the evidence in the case. The conduct categories of exclusionary overbidding and overbuying were covered in the following paragraph:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

Id.

After a lengthy trial, the jury returned a verdict for Ross-Simmons of $26,256,406, which was trebled to $78,769,218, and judgment was entered. *Id.* 4a.

Weyerhaeuser appealed to the Ninth Circuit, and the principal issue on appeal was Weyerhaeuser's contention that *Brooke Group* must apply, as a matter of law, in this case. The Ninth Circuit affirmed the jury's verdict and the judgment of the district court, emphasizing the unique facts of the case, particularly the effects of raising prices to cut off access to alder sawlogs in this inelastic natural resource inputs market.

The Ninth Circuit paid careful attention to this Court's decision in *Brooke Group*, correctly recognizing that *Brooke Group* created a high standard of liability in a particular category of Section 2 cases, aggressive price-cutting by monopolist sellers. The Ninth Circuit also correctly identified from *Brooke Group* the two principal reasons for that special rule: (1) price-cutting invariably benefits consumers, which is the core goal of the Sherman Act itself, and (2) very substantial experience and research had demonstrated a high risk of false positives in cases based on price-cutting and that the Court did not want to deter the very conduct the Sherman Act otherwise valued. *Id.* 6a-8a.

The Ninth Circuit then compared that factual context to the context here, in which Weyerhaeuser artificially raised the costs of inputs necessary for production in an inelastic natural resource inputs market. *Id.* 8a-11a. The panel concluded that the benefits to consumers identified by the Court in *Brooke Group* attendant upon price-cutting by sellers did not exist in the context here, indeed that consumer harm from Weyerhaeuser's conduct was a distinct possibility, and that *Brooke Group* therefore did not control:

> [T]he concerns that led the *Brooke Group* Court to establish a high standard of liability in the predatory pricing context do not carry over to this predatory bidding context with the same force. Therefore, the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases.

Id. 11a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS OR WITH ANY DECISION OF THIS COURT

The Ninth Circuit correctly observed that this case presents a "legal question of first impression." Pet App. 5a. Indeed, no other court has considered whether the special predatory pricing rule of *Brooke Group* should be extended to the quite different situation of a monopsonist's efforts to control the price of and access to a critical input. It should be obvious that there can be no circuit conflict under these circumstances. Nor does the petition for certiorari even identify any cases *predating Brooke Group* that are in conflict with the decision of the Ninth Circuit in this case. Petitioner thus has failed to satisfy the criterion of a circuit conflict that most frequently results in this Court granting certiorari. *See* Sup. Ct. R. 10(a); Robert L. Stern, et al., SUPREME COURT PRACTICE 225-32 (8th ed. 2002).

Nor does the Ninth Circuit's decision "conflict[] with a relevant decision of this Court" pursuant to Rule 10(c) – and the petition does not contend otherwise.[5] It thus fails to satisfy a second important criterion for review.

The Ninth Circuit's decision correctly states the rule of law and rationales from *Brooke Group* and then concludes

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[5] The petition's suggestion that this case is appropriate for summary reversal is baseless, because there is no direct conflict with a decision of this Court. Sup. Ct. R. 16.1; R. Stern, SUPREME COURT PRACTICE, at 315-16. Moreover, there are alternative bases for affirmance not reached by the Ninth Circuit that were raised by Ross-Simmons in the Ninth Circuit and preserved on review here. *See supra* note 4.

that this Court's departure from general Section 2 standards to create specific requirements in monopoly price-cutting cases in *Brooke Group* is not warranted in this very different factual context. Pet. App. 6a-11a; *see also* U.S. Br. at 10 (emphasizing that *Brooke Group* "provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct – aggressive price-cutting"). The Ninth Circuit's unwillingness to extend *Brooke Group* to the quite different factual scenario presented by this monopsony case simply cannot be described as a conflict with *Brooke Group* or any other decision of this Court. The Ninth Circuit did not ignore, or otherwise fail to accord appropriate respect to, a controlling decision of this Court. Nor is this a situation where an intervening decision of this Court created a conflict with a previously issued court of appeals decision that was not yet final.

Lacking any credible basis for asserting a conflict with any other court decision, Weyerhaeuser halfheartedly suggests that this case "cannot be reconciled" with a single Fifth Circuit decision from fifteen years ago, *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990). Pet. at 16. Weyerhaeuser did not even cite that decision in its opening brief to the Ninth Circuit, much less contend that it prescribed the correct rule of law for the present case. In all events, *In re Beef* did not address either *Brooke Group* (which was decided three years later) or its underlying rationales. The case did not purport to establish a general rule for monopsony pricing, and the Fifth Circuit's actual disposition of the monopsony claim against the single firm in that case held that the claim failed for insufficient evidence of market power. *In re Beef*, 907 F.2d at 514-16. That the petition would have to stretch so far to manufacture an inconsistency (not even an actual conflict) with a single

fifteen-year old decision that *pre-dates Brooke Group* speaks volumes about the weakness of petitioner's case for review.

II. THE PETITION DOES NOT PRESENT ANY QUESTION OF EXCEPTIONAL IMPORTANCE WORTHY OF THIS COURT'S ATTENTION

The petition also fails to establish that this case presents an important question of federal law that has not been but should be resolved by this Court.

The frequency with which an issue arises is a critically important indicator of its importance. R. Stern, SUPREME COURT PRACTICE, at 228. Here, there are no other reported cases that have presented this issue in the 12 years since *Brooke Group*. The petition itself cites only eight cases in the last century involving exclusionary overbidding or overbuying, and none in the last 15 years. Pet. at 28 n.12.

The infrequency with which the question presented here arises makes quite clear that the question is of no legal or practical importance. Nor is petitioner correct that the Ninth Circuit has announced a radical new rule that threatens a significant expansion of Section 2 liability based on the purchasing practices of companies with market power. *See, e.g.*, Pet. at 2, 27. The general rule that Section 2 applies to the abuse of monopsony power as well as monopoly power has been uncontroversially in place for decades. And the Ninth Circuit's decision here is an extremely narrow one, based expressly on the specific and highly unusual characteristics of the input market for alder hardwood logs in the Pacific Northwest.

Furthermore, the Ninth Circuit did no more than apply its 22-year old *Reid Brothers* precedent, which endorsed the imposition of Section 2 liability under a factual

scenario strikingly similar to the present case. In *Reid Brothers*, the market was geographically confined to the harvest from a single national forest in southeast Alaska. It was highly inelastic because the annual harvest from the Tongass National Forest was limited by statutory sustainability requirements. Two large forest products companies conspired to control that log supply, using essentially the same arsenal of exclusionary tactics employed by Weyerhaeuser here. By the time *Reid Brothers* was tried, defendants' monopsony was complete and log prices had been driven down substantially to the obvious detriment of log sellers, primarily the federal government. The Ninth Circuit upheld the jury's imposition of liability based on the same generally applicable Section 2 standards the Ninth Circuit applied in this case. *Reid Brothers*, 699 F.2d at 1298 & n.5, 1299.

The fact is that *Reid Brothers* has been on the books in the Ninth Circuit for more than two decades without causing any of the legal or practical difficulties about which the petition for certiorari warns. That should be enough to dispose of petitioner's highly unusual plea that the need for immediate review is "especially acute" so that this Court can "straighten[] out the law" at the outset on a legal question of first impression, lest a deluge of litigation ensue. Pet. at 28, 30. That plea is, in all events, antithetical to the principles of judicial restraint that guide this Court's exercise of its certiorari jurisdiction.[6]

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[6] The contrast between this case and other antitrust cases already accepted for review this term illustrates the point. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005), *cert. granted*, 125 S. Ct. 2937 (2005) (No. 04-1329) for example, the issue is the proper treatment of a patent in the analysis of monopoly market power in a tying case, which presents a very common issue that has a substantial history of lower court case law development and circuit conflicts. Those

Even if the question presented in the petition could be said to have some general significance in the abstract (and it does not), review by this Court of petitioner's "legal question of first impression," Pet App. 5a, would be premature. This Court's opinion in *Brooke Group* details a long, full debate leading up to the decision, including the development of economic data and publications by leading antitrust practitioners and theorists, a range of lower court decisions that had confronted the issue and had come to differing and conflicting analytic conclusions and results, and a lead-up to the issue in the Court itself. *Brooke Group*, 509 U.S. at 223-26. Contrast that "two decades of contentious debate" leading up to *Brooke Group* (to use petitioner's own phrase, Appellant's Pet. For Rehearing or Rehearing *En Banc* at 1), with the 12 years of dead silence in the case law since then on the issue presented by the petition in this case. Even *before Brooke Group* was decided, the monopsony question presented in this case rarely arose, and was the subject of no controversy in the courts of appeals.

Indeed, the case for review here is significantly weaker than in *3M v. LePage's* in which the Court denied review in June 2004. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 141 (2004). In that case, the Court declined to take up the question whether *Brooke Group* should be extended to allegations of so-called predatory bundling, after the United States had explained that review would be unwarranted in light of the absence of a

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same certiorari-worthy characteristics are shared by *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004), *cert. granted sub nom. Shell Oil Company v. Dagher*, 125 S. Ct. 2958 (2005) (No. 04-814), *consolidated with Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004), *cert. granted sub nom. Texaco, Inc. v. Dagher*, 125 S. Ct. 2957 (2005) (No. 04-805), which involve the treatment of joint ventures in a price-fixing claim.

circuit conflict and inadequate development of the law in the lower courts, *see* U.S. Br. at 8, 15-16 (noting the lack of conflict, "novel" quality of issue, and need for lower courts to "refine and clarify" the issue); the lack of experience and economic data relevant to the challenged practice (*id.* at 8, 14); the danger of an ill-informed and ill-considered decision, which could result in stifling competition (*id.* at 8-9); and the absence of any pressing need or compelling reason for review (*id.* at 8, 19). The question presented in this case has received even less judicial attention and scholarly expert analysis than the question presented in *LePage's*. Accordingly, just as in *LePage's*, it would be precipitous for this Court to intervene now and grant review.

Finally, in assessing the importance of the issue on review, it is significant that the petition misstates the question presented. In the trial court and the court of appeals, it was Weyerhaeuser's all-or-nothing position that *Brooke Group* must apply, period,[7] and therefore that petitioner either was entitled to JMOL because of a failure of proof or to a new trial because the jury instructions did not state the *Brooke Group* requirements.[8] Accordingly, when

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[7] *See* Fed. R. Civ. P. 51(c),(d) (requiring party to state "distinctly the matter objected to and the grounds of the objection" when challenging a jury instruction in the trial court in order to preserve a claim of error for appeal).

[8] The Ninth Circuit described Weyerhaeuser's position as follows:

> Specifically, Weyerhaeuser argues that the jury instructions were erroneous because the court did not instruct the jury that overbidding for sawlogs could be anticompetitive only if Weyerhaeuser

the Ninth Circuit concluded that *Brooke Group* did not apply to the facts in this case, that completely resolved Weyerhaeuser's challenge to the jury instruction on exclusionary overbidding and overbuying.[9]

The Ninth Circuit's actual decision thus is limited to the question whether *Brooke Group* applies here, and it raises no broader questions about the validity or purported national economic ramifications of the text of the jury instruction on exclusionary overbidding and overbuying given by Judge Panner.

III. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

Even if a mere plea for error correction could justify granting certiorari (and it cannot), Weyerhaeuser's petition fails because the Ninth Circuit's decision plainly was correct.

This case involves nothing more than a straightforward application of established Section 2 principles. A business violates Section 2 if it seeks or maintains monopoly

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> operated at a loss and a dangerous probability of its recoupment of losses existed.

Pet. App. 7a, 8a (same re: JMOL).

[9] The Ninth Circuit held:

> Our conclusion that *Brooke Group* does not apply here disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.

Pet. App. 5a.

power by acting "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). Intent remains relevant to determining whether conduct is fairly characterized as anticompetitive, which is behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting III Philip E. Areeda & Donald F. Turner, ANTITRUST LAW 78 (1978)); *see also* U.S. Br. at 9 (detailing the "incremental guidance for applying Section 2" developed by the Court). Those and other related principles are embodied in the American Bar Association's Sample Jury Instructions in Civil Antitrust Cases, C-20 (1999), which were reflected in the jury instructions in this case on anticompetitive conduct, quoted in their full length in the Ninth Circuit's opinion, Pet. App. 14a n.30 (reproduced at pp. 11-12 *supra*).

Ross-Simmons had substantial burdens to meet in order to establish market power, anticompetitive conduct, specific intent to monopolize, and causal antitrust injury. Pet. App. 16a-17a. Weyerhaeuser had ample opportunity to dispute the underlying factual allegations at trial and to justify its conduct on the grounds of efficiency or some other legitimate business practice, and the jury instructions expressly so instructed the jury. *Id.* 14a n.30; *see also id.* 17a ("Anticompetitive acts or predatory acts are those that tend to exclude or restrict competition 'on some basis other than efficiency,'" quoting *Aspen Skiing Co.*, 472 U.S. at 605). Indeed, in addition to the general instructions, the specific instruction on exclusionary overbidding and overbuying also stated that the jury was only permitted to find that raising prices and buying too many logs was

anticompetitive *if it was done to foreclose or unduly restrict competition, i.e.*, "*in order to prevent the Plaintiffs from obtaining the logs they needed* at a fair price." Pet. App. 14a n.30 (emphasis added). There can be no doubt based on the facts and conclusions detailed by the Ninth Circuit and set forth herein at pp. 4-9, *supra*, that Weyerhaeuser possessed market power and acted with the "specific intent to eliminate [or foreclose] competition," Pet. App. 18a, 20a, and that it did so through unnecessarily restrictive means by effectively cutting off its competitors' supply of the resources necessary to operate their business, *id.* 19a ("Weyerhaeuser's overbidding for sawlogs clearly threatened competition because it restricted competitors' access to the limited supply of sawlogs").

In order to extricate itself from clear liability under established Section 2 standards, Weyerhaeuser asks this Court to make intent irrelevant and shield it from liability so long as it was not forced to sacrifice all profit while it successfully and intentionally used its market power to control prices, restrict access to resources necessary for production, destroy its competitors, and eliminate price competition. The cornerstone of that extraordinary request is the argument that monopoly and monopsony are but mirror images, and that their "symmetry" dictates that the special *Brooke Group* requirements which apply to one category of a monopolist seller's conduct (aggressive price-cutting) must apply to *all* categories of conduct by a monopsonist buyer (both price-related and other anticompetitive conduct).

That clichéd characterization of monopoly and monopsony as twins is no substitute for actual economic analysis. *See, e.g.*, Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 The Antitrust Bulletin 1, 5, 11, 43-44 (1991) (monopsony and monopoly are not completely analogous, there is no real-

world symmetry between the two, and there are at least five substantial reasons for analyzing monopsony cases differently).

Brooke Group was the culmination of 20 years of study and debate in the academic legal and economic literature, as well as analysis in decisions by this Court and the lower federal courts, to address the particular, common problem in antitrust law of aggressive price-cutting by monopolist sellers. *Brooke Group*, 509 U.S. at 222-24; U.S. Br. at 10 ("Brooke Group has provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct – aggressive price-cutting."). *Brooke Group* ultimately concluded that "[l]ow prices benefit consumers regardless of how those prices are set," and then opted for a two-prong, bright-line test of unprofitability and recoupment based on its concern about the courts policing a system where the demonstrable prevalence of false positives would "chill the very conduct the antitrust laws are designed to protect," *i.e.*, competition to provide lower prices to consumers. *Brooke Group*, 509 U.S. at 223-26 (quotation marks omitted).

Although the petition repeatedly asserts that the essence of *Brooke Group* is protection of unrestricted price competition generally – while ignoring that Weyerhaeuser controlled prices and acted with the specific intent of *putting an end to price competition* – that characterization of *Brooke Group* plainly is not correct. What is correct is that *Brooke Group* sought to protect the manifest direct benefits to consumers from *competition that produced lower prices*: *Brooke Group* created a special rule of Section 2 liability in the "specific context of aggressive price-cutting . . . that preserves the important role of price-cutting as a primary means of competition on the merits." U.S. Br. at 11.

Thus, the first and most important distinction that the Ninth Circuit recognized between *Brooke Group* and this case is that Weyerhaeuser's conduct, raising the costs of natural resource inputs needed for production, is materially different from lowering the price of goods sold to consumers. Pet. App. 10a. Unlike in *Brooke Group*, there is no presumption discernible from case law, professional literature or experience that exclusionary overbidding resulting in higher input costs here is the type of price competition that the antitrust laws are designed to protect. *Id.* 8a-10a; *see also* U.S. Br. at 12-13 (same conclusion as to bundled rebates by monopolist sellers). Commentators as recently as this year have remarked that "[w]hat is plainly needed is a good deal of additional work [on a number of unresolved issues regarding buyer power] that begins with empirical studies of particular industries." Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 656 (2005) ("As any antitrust expert knows, predatory pricing has generated an enormous literature . . . In contrast, there is little legal or economic analysis of predatory bidding.").

The market and transactions here bear almost no resemblance to the market for sales to consumers that the Court confronted in *Brooke Group*. Accordingly, the Ninth Circuit correctly stated, in a measured conclusion, that the *Brooke Group* concerns "do not carry over to this predatory bidding context with the same force" and the "high standard of liability" of *Brooke Group*, therefore, does not control. Pet. App. 11a.

The Ninth Circuit's conclusion is supported by consideration of the effects of exclusionary overbidding on consumer welfare and the level of risk for false positives. The Ninth Circuit recognized that the "overall effect of a

predatory bidding scheme would result in harm to consumers" because, in part, the monopsonist would have no incentive to pass along any future input cost savings during a recoupment period to consumers. *Id.* 10a-11a. The panel further stated that the inelastic nature of the input market here, where overall supply can't increase, obviates many of the traditional underpinnings for new entrants, innovation, and efficiency that appear in other markets where the output market can expand. *Id.* 11a. Indeed, monopsony control of this market produces a *disincentive* for sellers to plant new trees because of concerns about lack of choice and low prices in the future, and those reductions in supply adversely affect future consumer welfare. *See* Roger D. Blair & Jeffrey L. Harrison, MONOPSONY, 72 (1993). In addition, artificially high, non-optimal prices set by a dominant buyer inevitably result in social welfare losses. *Id.* at 36-61, cited at Pet. App. 6a n.5.

There is no evidence in the record to support any positive consumer benefit.[10] To the contrary, Judge Panner found there was substantial evidence that:

> Defendant was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard,

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[10] In the Ninth Circuit before the panel, Weyerhaeuser took the position that there could be no actionable claim unless there was injury to downstream consumers by an increase in the price of the end product. Brief of Appellant at 23 n.21. When the Ninth Circuit panel then rejected that contention in its opinion, Pet. App. 10a-11a, Weyerhaeuser sought rehearing *en banc* and contended that it was a "fundamental" error for the panel even to consider the effect on downstream consumers, and that the only "consumer" that mattered was the seller of the sawlogs. Pet for Reh. at 7-9. In this Court, Weyerhaeuser continues to repudiate the position that it took before the panel and focuses on the seller as the consumer.

> and that Defendant allegedly overpaid by $20 million per year for logs as part of a scheme to deliberately deprive Ross-Simmons of logs or forcing it to operate at a loss by driving up costs.

Pet. App. 34a. Blair & Harrison have stated that there is one bright-line test highly indicative of predatory buying – destroying a perishable input or hoarding:

> This type of behavior, especially when accompanied by a bidding war for the input, is hard to interpret as anything other than an effort to deny the competing buyers access to the input . . . The welfare loss could not be more obvious.

MONOPSONY, at 155-156. The contrast of the adverse consumer effects here to the presumptive direct benefits to consumers of the price-cutting by sellers considered in *Brooke Group* also "could not be more obvious."

So too is the contrast to *Brooke Group* when one examines the matter of false positives, starting with the fact that the dearth of cases is perhaps the best indicator of the lack of false positives. The petition points to no cases suggesting the existence of false positives, much less the risk that they would occur with any frequency. The Ninth Circuit expressly pointed to the higher likelihood of success of Weyerhaeuser's scheme in an inelastic market, where access to the necessary input is restricted by the monopsonist and the market supply thus cannot respond and act as a corrective force for that anticompetitive conduct. Pet. App. 11a. Similarly, the existence of barriers to entry, which the jury found as an element of market power, necessarily implies that the recoupment that Weyerhaeuser projected here was a

viable strategy. *Id.* 19a-20a (substantial evidence of plan and capacity to recoup); *id.* 22a-25a (substantial evidence of barriers to entry); *see also* Brief of Appellant at 31-32 (Weyerhaeuser contended that barriers to entry were so low that recoupment was not possible).

The low risk of false positives also is clearly demonstrated by the successful schemes chronicled in the Ninth Circuit's opinions in this case and in *Reid Brothers* on nearly identical facts 22 years ago. As Justice Cardozo observed more than 70 years ago, "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

Weyerhaeuser has a heavy burden to demonstrate a compelling need to replace well-established Section 2 liability standards with a bright-line *Brooke Group* test. The petition fails to carry that burden. The rationales that supported the *Brooke Group* decision do not apply here; the unusual factual context is not representative of the wide range of potential monopsony situations; and there is a glaring lack of sufficient experience, data, case law or professional literature necessary to inform such a far-reaching decision. *See* U.S. Br. at 18-19 (same in *LePage's*). The Ninth Circuit recognized this and properly issued a narrow, case-specific holding.[11]

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[11] A number of potential *amici curiae* have filed briefs in support of Weyerhaeuser's petition for certiorari, including groups that also appeared as *amicus curiae* in support of 3M Company's petition for certiorari in *LePage's*, where they predicted that similar economic calamities would befall them. Despite their stated concerns, any one of the lawyers for *amici* presumably would have very little trouble distinguishing the Ninth Circuit's decision in this case in virtually any subsequent matter involving their clients. That experience with other distinct factual

There is simply no way that a reasonable legislator supporting the enactment of Section 2 of the Sherman Act would have intended to create a bright-line rule that would eliminate any consideration of Weyerhaeuser's intent or conduct and insulate Weyerhaeuser from antitrust liability just as long as it was making a profit. The Ninth Circuit correctly concluded that the "blind application of a numerical test would only frustrate the intent of the Sherman Act." Pet. App. 12a (quoting *Reid Brothers*, 699 F.2d at 1298 n.5).[12]

The jury in this case was perfectly capable of reaching a reasoned conclusion as to whether Weyerhaeuser's conduct violated the Sherman Act. The jury was entitled to disbelieve Weyerhaeuser's denials that the

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circumstances and the development of the law in the lower courts is precisely what needs to take place before this Court steps in and issues a decision with the kind of sweeping import that Weyerhaeuser urges here.

[12] Indeed, the specific problem of predatory manipulation of log markets has long been a concern of the United States where it sells timber from federal lands. In 1958, Congress amended the Small Business Act to require a "fair proportion" of total sales of government property go to small business "to preserve free competitive enterprise." 15 U.S.C. § 631(a). After experiencing problems with an *ad hoc* approach, the Small Business Administration and the Forest Service in 1971 established defined standards for how and when to reserve sales for exclusive bidding by small business. A challenge to that program was rejected, based in part on testimony from a top SBA official showing that the previous program had been ineffective at preventing preclusive bidding by large companies and their "increasing quasi-monopoly." *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 367, 370 (D.D.C. 1976), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976).

conduct occurred and its protestations that if it occurred the conduct was nothing other than legitimate competitive behavior. That is the authority that Congress expressly gave to a jury, and the result in this case is entirely consistent with the intent of Section 2 itself. The Ninth Circuit correctly concluded that the jury was not obliged by law to apply the stringent requirements of *Brooke Group*, and thus the court properly affirmed the jury's verdict on these facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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